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# REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

## Report of the Secretary-General prepared pursuant to Sub-Commission resolution 1993/29

## Addendum

The present document contains information submitted by the Governments of Germany, Japan and Zimbabwe received after the preparation of document E/CN.4/Sub.2/1994/7.

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## Germany

[Original: English]
[3 June 1994]

1. Not least in order to be able to alleviate hardship in individual cases the Federal Government has introduced a series of extra-legal compensation regulations supplementing the statutory provisions.

2. Between 1980 and 1988 various hardship funds were established for this purpose. Following the unification of Germany the Federal Government and the Conference on Jewish Material Claims against Germany agreed in 1992 to create an additional hardship fund for Jewish victims of persecution who had hitherto received no or only modest compensation under the existing legal provisions. Finally, by way of a humanitarian gesture not implying the recognition of a legal obligation, the Federal Government reached agreement with Poland (1991) and the former Soviet Union (1992) on the establishment and endowment of foundations whose resources were to be used for particularly aggrieved victims of Nazi persecution.

3. While the overall assessment of the Bundes Entsehädigungs Gesetz (BEG) (Federal Law on Reparation) is positive, the law did have its inadequacies and decisions based on the law showed shortcomings. For instance, many observers maintained that damage to property and possessions, though accounting for only about 10 per cent of all payments under the BEG, in some cases received too favourable consideration in comparison with the less generous treatment of damage to life and health. On the other hand, one group of victims had been clearly favoured. They were former members of the German civil service, including judges, professors and teachers, who were reinstated in the position, salary or pension group which the claimant would have reached had the persecution not taken place. It is against this background that in a set of principles and guidelines for national compensation policies, formulated on the basis of the experience gained by the German Wiedergutmachung, the first two principles and guidelines read as follows:

> "(i) The principle of equality of rights of all victims is of primary importance. This does not mean that they should all receive the same amount of relief, but it does mean that they should enjoy the same rights within the scope of the claims laid down by the law;
>
> "(ii) It is necessary to have a central planning, legislative, and administrative institution, since only the principle of centrality can ensure the principle of equality of rights."

## Japan

[Original: English]
[5 July 1994]

1. The Government of Japan is of the opinion that the basic principles and guidelines included in the study prepared by the Special Rapporteur include such theoretical and practical difficulties as those regarding the legal ability of an individual under international law and the applicability of

uniform measures to promote and protect human rights in States, and, therefore, further cautious and careful study is needed for the reasons described below.

2. It is generally understood that the stipulation of rights and duties of an individual in international agreements is not enough to ensure that he or she is a subject of international law. For an individual to be a subject under international law, the existence of specific international procedures available to him or her to exercise his or her rights stipulated in international agreements is essential. In the field of human rights, an individual generally is not recognized as a subject under international law at the present stage. In Mr. Theo van Boven's report, he asserts that an individual victim of a human rights violation has the right to reparation under international law, but he does not clarify the reasons and grounds under international law. The argument concerning State responsibility in the United Nations International Law Commission, which he refers to, is limited to the sphere of relations between States, and does not envisage any rights of an individual victim under international law, as the Special Rapporteur argues.

3. The question of by what process the human rights stipulated in existing international standards, such as the International Bill of Human Rights, should be protected internally is primarily a matter of the domestic policy of each State, including the content of "the right to reparation". In fact, each State has a different legal system to protect human rights, and the situation with regard to the implementation of international standards differs from State to State to a large extent. Accordingly, effective establishment of a new international standard to promote human rights always requires that it has genuine international applicability, is acceptable to various legal systems in the world, and contributes to the promotion of human rights through those legal systems. Therefore, as in other cases, in any attempt to introduce a new international standard, or to amend the existing international standards, concerning "the right to reparation", including the procedure whereby individuals can register a human rights violation and the nature of the remedies to be given to victims (para. 136.5 of the report), careful examination of the necessity and effectiveness has to be undertaken first, from this viewpoint.

4. We appreciate the significance of such measures as reparation to victims, investigation and prosecution of perpetrators, and disclosure of information. Nevertheless, when considering whether to establish international standards on those measures, one must fully take into account the differences between various legal systems.

5. In the field of criminal justice, for instance, every State has its own institutions which govern whether or not a particular suspect should be prosecuted. Japan adopts the system of discretionary prosecution, under which, even if a suspect obviously committed the crime, the public prosecutor is allowed not to institute a prosecution when the prosecutor does not deem prosecution necessary, considering all conceivable aspects of the case including the suspect's character, his or her age, his or her personal history, the gravity of the offence, the circumstances under which the offence was committed and the conditions subsequent to the offence, such as compensation to the victim and the victim's feelings. On the other hand, the

mechanism to prevent unfair or arbitrary decisions of non-prosecution, including the Committee of the Inquest of Prosecution, guarantees the propriety of the system of discretionary prosecution.

6. Statutory limitations against prosecution have also their rationales, which are described below. First, the system permits to defer to a reduction in the social impact of crimes, such as the victim's feelings and the public demand for retribution, as time passes.

7. Secondly, the system is grounded both on the increasing difficulty in proving a suspect's guilt with the passage of time due to the scattering of evidence, and on the request to secure legal stability by avoiding forcing an unstable position on a suspect for too long a period.

8. Thirdly, there is an understanding that statutory limitations are a means to restrict a State's power to prosecute in order to protect a suspect's rights.

9. With regard to the disclosure of information, the records of criminal cases often have limited disclosure for such purposes as to prevent the destruction of evidence, and to protect the privacy of those concerned. Appropriately enough, the legal systems of States reflect this consideration. For the same reason, the Government of Japan restricts the disclosure of the records of criminal cases prior to trial.

## Comments on the "Proposed basic principles and guidelines" (para. 137 of the report)

### Paragraph 1

10. The concept of "gross violations of human rights and fundamental freedoms", to which, according to the report, particular attention must be given, is vague as a legal concept. Particularly, the lack of balance in selecting examples of gross violations, treating genocide and deportation in a single category and excluding murder, suggests the concept needs further study.

### Paragraph 2

11. It should be considered that each State has its own systems of preventing and investigating violations of human rights, taking effective action against violators and affording remedies to victims. Those systems have their own rationales. It is not appropriate to oblige all States to take uniform measures regardless of differences in their systems.

### Paragraph 5

12. "A duty to prosecute and punish perpetrators" is not a general obligation of States, apart from specific international agreements which impose such an obligation on their parties. It is true that some of the international humanitarian treaties drafted after the Second World War, including the Geneva Conventions (1949) and the Optional Protocol I thereto (1977) require States to take domestic measures to punish violators of certain human rights, and

that most of the States in the world have acceded to the Geneva Conventions. But this does not prove the general applicability of such requirements.

13. There is no common understanding of what activities constitute "crimes under international law". Even if only the extremely inhumane activities among the examples given in paragraph 1 are to be included, their definitions are too vague to allow punishment, because punishment of activities only vaguely defined is incompatible with fully established principles of criminal justice such as nulla poena sine lege (no punishment without law).

14. The word "impunity" in the second sentence of paragraph 5 is not clear either. It is inappropriate if this sentence completely denies such systems as discretionary prosecution and statutory limitations against prosecution, both of which are recognized as important principles in the criminal justice scheme of States. "Impunity" should at least be changed to an expression such as "arbitrary impunity".

Paragraph 7

15. The concept of "the groups of victims" who, the Special Rapporteur maintains, should be entitled to bring collective claim and to obtain collective reparation is not clear. Human rights are, by definition, the rights of individuals, and no one other than an individual is entitled to exercise such rights. In all cases, each individual victim of a human rights violation is entitled to claim damages based on the laws of tort and civil procedure in his or her own State on the ground that his or her human rights have been violated, without recourse to collective claims. Thus, there would be no need to stipulate such a vague concept as "collective right to reparation" in the proposed principles, in relation to the remedies sought through judicial procedure.

16. Moreover, the substantive content of the collective right in the first sentence is unclear, and the relation between the rights of individuals and of groups is not fully examined. If the Rapporteur maintains that a group should be allowed to claim damages through means other than actions in court by individuals, then the distinctive content of the right of groups must be clarified before discussing procedural matters.

Paragraph 9

16. It is not clear on what grounds education is indicated as an example of lost opportunities.

Paragraph 11

17. It is not appropriate to demand that all States take identical measures, without any limitations, regarding investigation of human rights violations, public disclosure of information and punishment of the perpetrators.

Paragraph 12

18. There is no common understanding of what activities constitute "crimes under international law". Even if only the extremely inhumane activities among the examples given in paragraph 1 are to be included, their definitions are too vague and unclear. If this paragraph intends to require States to criminalize activities with such vague and unclear definitions, it is not appropriate because those criminal prohibitions would be incompatible with fully established principles of criminal justice such as nulla poena sine lege.

Paragraph 15

19. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity was adopted by the United Nations General Assembly in 1968, came into effect in 1970, and has since been ratified by 36 States. However, judging from the fact that many States, including Japan, have not ratified the Convention, it is unfair to conclude that non-applicability of statutory limitations to activities in violation of international humanitarian and human rights laws is a universally recognized principle. The system of statutory limitation has the following rationales, and it is not necessarily appropriate to provide an exception to it.

20. In civil cases, statutory limitation is a mandatory provision for the stability of society. There is no rational reason not to apply it after it becomes possible for the victim to claim remedies. Moreover, the question of punishment against an offender is irrelevant to the statutory limitation in civil cases; it should be considered in criminal cases.

21. In criminal cases, first, the system of statutory limitation against prosecution is based on the idea that the necessity of punishment declines and the effective value of punishment is extinguished as the social impact of the crime declines over time, because the victim's feelings and the public demand for retribution against the offender gradually fade.

22. The second ground of statutory limitation is the increasing difficulty in proving a suspect's guilt with the passage of time, owing to the scattering of evidence. In other words, as time goes by, fact-finding becomes increasingly difficult owing to the loss and transformation of the memory of relevant witnesses, including the victim, the death or unavailability of witnesses, the loss of relevant documents and other tangible evidence, and so on. The prosecutor naturally has difficulties in proving guilt. What is more, the accused faces the same difficulties: it is even possible that an innocent defendant may be found guilty because he or she cannot fully defend himself or herself owing to difficulties in collecting enough evidence to prove his or her innocence. In any event, if the case is brought to the court a long time after the crime was supposed to be committed, the possibility of wrong judgement increases, in contradiction of justice.

23. Third, statutory limitation is necessary to secure legal stability by avoiding imposing an unstable position on a suspect for too long a period.

24. Fourth, there is an understanding that statutory limitation is one means to restrict a State's power to prosecute, in order to protect a suspect's rights.

25. Moreover, the first sentence of paragraph 15 is not appropriate if it asserts that remedies should be given retrospectively in those cases which treat actions which had not been recognized as illegal in the past. The sentence is also not appropriate because it relates a criminal case to remedies to the victim directly, if the human rights violations referred to in this sentence include those treated as criminal cases.

26. The second sentence of paragraph 15, if it completely denies the application of statutory limitation to cases of gross violation of human rights, is not appropriate, considering the various rationales of statutory limitation described above. In criminal cases, if a case is brought to the court a long time after the crime was supposed to be committed, wrong judgement is more likely to occur; in civil cases, it would be irrational to continue to allow the victim to claim relief from the offender no matter how long the victim has gone without exercising his or her right to relief.

27. In any event, none of the proposed basic principles and guidelines should be applied retrospectively.

Paragraph 17

28. It would not be practical to expect every State to make readily available to the public all evidence in its possession concerning human rights violations without exception. For instance, it is impossible for any State to disclose fully information which concerns national security or individuals' privacy.

29. Moreover, the system of disclosure of evidence in judicial proceedings is structured according to such requirements as the parties' right to control evidence, due process to the other party and the elucidation of the truth. Thus, it is not necessarily appropriate only to demand that States make available all evidence in their possession.

Paragraph 18

30. The paragraph obliges the courts or other judicial organs of States, in the absence of other evidence, to find facts concerning human rights violations only on the basis of the testimony of witnesses. This paragraph may be in conflict with fundamental rules on fact-finding, for example Prinzip der freien Beweisewurdigung (the principle of the free discretion of judges in evaluating evidence), which is one of the most fundamental principles in modern legal systems. If the paragraph requires the courts to find the facts of a human rights violation whenever victims testify to such facts, this is clearly incompatible with the above principle, in that the judge is not allowed to find the facts otherwise.

## Zimbabwe

[Original: English]
[15 June 1994]

The basic principles and guidelines proposed by the Special Rapporteur of the Sub-Commission were found to be acceptable by the Zimbabwe Inter-Ministerial Committee on Human Rights. It was felt that they would go a long way in strengthening the right to reparation for victims of violations of human rights. The Committee, however, had problems with the following proposed principles:

(i) Item 7 provides that in addition to providing reparations to individuals, States shall make adequate provisions for groups of victims to bring collective claims and to obtain collective reparation. It was the Committee's view that this could lead to mass or indeterminate claims. Zimbabwe does not recognize collective claims.

(ii) In item 11 the provision of satisfaction and guarantees of non-repetition includes the verification of facts and full and public disclosure of the truth and apology. Many States may not have the political will to make full and public disclosure of the facts, let alone to apologize, and it is unlikely that such States would accept the principle. The principle would be more acceptable if disclosure is not done publicly but perhaps in terms of conditions set by a court of law.

(iii) Item 17 requires that every State makes readily available all evidence in its possession concerning human rights violations. This requirement is in conflict with the law relating to State privilege (particularly in Zimbabwe) and States would find it unacceptable, especially if the alleged violations involve security organs of the State.

(iv) The study was limited to "gross violations of human rights and fundamental freedoms". The Committee sees no justification for any distinction at all, especially in view of the fact that the Special Rapporteur conceded that there is no agreed definition of gross violations, even if he had attempted a definition.

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